G&M Oil Co., Inc. v. American Zurich Ins. Co., et al
SACV 15-204 JVS (DFMx)

TENTATIVE Order Regarding Motions for Partial Summary Judgment

Two motions are before the Court.

Plaintiff G&M Oil Company, Inc. ("G&M Oil") moved for partial summary judgment as to G&M's fifth cause of action for declaratory relief in its complaint against American Zurich Insurance Company, Zurich American Insurance Company (together, "Zurich"), and Zurich Services Corporation ("ZSC") (collectively, "Defendants"). (Mot., Docket No. 86.) G&M Oil submitted a request for judicial notice in support of its motion. (Req. Jud. Ntc., Docket No. 86-3.) Defendants opposed. (Opp'n, Docket No. 114.) Defendants submitted a request for judicial notice. (Req. Jud. Ntc., Docket No. 114-2.) G&M Oil replied. (Reply, Docket No. 116.)

Defendants moved for partial summary judgment as to G&M's first, second, third, and fourth causes of action.[1] (Mot., Docket No. 89.) G&M Oil opposed.[2] (Opp'n, Docket No. 112.) Defendants replied. (Reply, Docket No. 119.)

For the following reasons, the Court (1) **grants** G&M Oil's motion for partial summary judgment and (2) **grants** Defendants' motion for partial summary judgment.

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[1] Defendants filed a voluminous amount of paper in support of its motion. For instance, one document, bound only at the top, contained at least 1,200 pages. (Snyder Decl., Docket No. 88-2.) In the future, the Court requests that Defendants file such large documents in three-ring binders.

[2] Local Rule 11-3.1.1 states that "[a] proportionally spaced font must be standard (e.g., non-condensed) 14-point or larger, or as the Court may otherwise order. A monospaced font may not contain more than 10-1/2 characters per inch." The font in G&M Oil's opposition to Defendants' motion is smaller than 14-points. The Court reminds G&M Oil that the Court could strike the document for failing to comply with Local Rule 11-3.1.1.

I. BACKGROUND

A. Judicial Notice

G&M Oil requests that the Court takes judicial notice of nine exhibits, which are labeled as exhibits 1–9.[3] (Req. Jud. Ntc., Docket No. 86-3.) Defendants also request judicial notice of sixteen exhibits, which are labeled as exhibits A–P.[4]

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[3] (1) In re Matter of the Licenses and Licensing Rights of American Zurich Insurance Company and Zurich American Insurance Company of Illinois, File No. DISP-2011-00811 before the Insurance Commissioner of the State of California, Notice of Hearing and Order to Show Cause dated February 27, 2012 (Exhibit 1); (2) In re Matter of the Licenses and Licensing Rights of Zurich American Insurance Company and Zurich American Insurance Company of Illinois, File No. DISP-2011-00811, before the Insurance Commissioner of the State of California, Settlement Agreement, dated July 11, 2013 **(**Exhibit 2); (3) Application of Insurance Commissioner to File Amicus Curiae Brief, DMS Serv. ("Commissioner Appl., DMS Serv."), No. B235S19, 2011 WL 6345401, (Cal. Ct. App. Dec. 14, 2011) (Exhibit 3); (4) Letter dated February 14, 2011 from California Department of Insurance to Workers' Compensation Insurance Rating Bureau of California regarding Workers' Compensation Insurer Collateral Agreements (Exhibit 4); (5) Notice of Proposed Action and Notice of Public Hearing, Workers' Compensation Policy Forms, California Department of Insurance, Reg. File No. REF-2014-00014, dated December 9, 2014, Id. ¶ 3 (Exhibit 5); (6) Initial Statement of Reasons, Proposed Amendments to Workers' Compensation Policy Forms, California Department of Insurance, Reg. File No. REF- 2014-00014, dated December 9, 2014, Id. ¶ 4 (Exhibit 6); (7) Text of Regulation Workers' Compensation Policy Forms, California Department of Insurance, dated December 9, 2014, Regulation File: REG-2014-00014 (Exhibit 7); (8) American Zurich Ins. Co. v. Country Villa Serv. Corp., 2015 WL 4163008 at *6 (C.D. Cal. July 9, 2015): Order re Country Villa's Motion for Partial Summary Judgment, Docket #87 (Exhibit 8); (9) Zurich American Ins. Co. v. Matchmaster Dyeing & Finishing Inc. et al., Case # 2:15-cv-00080-GW-PJW (C.D. Cal. January 14, 2016): Civil Minutes re Defendant Matchmaster's Motion for Partial Summary Judgment, Docket #139 (Exhibit 9).

[4] (1) "Workers' Compensation Insurance – Rate Filing Form" for Zurich Insurance Company, File # 95-8730, as retrieved from the California Department of Insurance website (https://www.insurance.ca.gov/) on November 9, 2016 (Exhibit A); (2) "Workers' Compensation Insurance – Rate Filing Form" for American Zurich Insurance Company, File # 95-8728, as retrieved from the California Department of Insurance website (https://www.insurance.ca.gov/) on November 9, 2016 (Exhibit B); (3) Healthsmart Pacific Inc., et al. v. Zurich American Insurance Co., et al., Case No. 08-cv-01207-JVS-RC, before the U.S. District Court, Central District of California, "Civil Minutes – General", filed February 20, 2009 (Dkt. 31) (Exhibit C); (4) DMS Services, LLC, et al. v. Zurich American Insurance Co., et al., Case No. EC 055245, before the Superior Court of the State of California for the County of Los Angeles-North Central

A court must take judicial notice if a party requests it and supplies the court with the requisite information. Fed. R. Evid. 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

For example, a court may take judicial notice of records and reports of administrative bodies. Interstate Nat. Gas Co. v. S. Cali. Gas Co., 209 F.2d 380, 385 (9th Cir. 1953). Judicial notice is also appropriate for court proceedings if those proceedings have a direct relation to the matter at issue. U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992). In addition, a court may take judicial notice of publicly available

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(Burbank), "Ruling Motion to Compel Arbitration and Stay Proceedings", determined August 5, 2011 (Exhibit D); (5) Zurich American Insurance Co., et al. v. Staffing Concepts International, Inc., et al., Case No. 14-CV-3454 before the U.S. District Court, Northern District of Illinois, Eastern Division, "Order", filed November 16, 2015 (Dkt. 54) (Exhibit E); (6) National Association of Insurance Commissioners, Accounting Practices & Procedures Manual 65-8 (Mar. 2016) (Exhibit F); (7) California Committee Report, Analysis of California Assembly Bill No. 2490 (2009-2010 Regular Session) as amended May 20, 2010 (June 28, 2010), 2010 WL 258946 (Exhibit G); (8) California Committee Report, Analysis of California Assembly Bill No. 2490 (2009-2010 Regular Session) as amended August 20, 2010 (Aug. 30, 2010), 2010 WL 3411130 (Exhibit H); (9) California Assembly Journal, 2009-2010 Reg. Sess., Gov. Messages, September 30, 2010 (Exhibit I); (10) Newspaper article from Business Insurance entitled "Calif. workers comp dispute-resolution bill vetoed" relating to California Assembly Bill 2490, dated October 11, 2010 (Exhibit J); (11) In the Matter of the Licenses and Licensing Rights of Zurich American Insurance Company and Zurich American Insurance Company of Illinois, File No. DISP-2011-00811 (Exhibit K); (12) Workers' Compensation Insurance Rating Bureau of California, California Retrospective Rating Plan (Apr. 2, 2015) (Exhibit L); (13) "Workers' Compensation Insurance – Rate Filing Form" for Zurich, File # 16-4040, as retrieved from the California Department of Insurance website (https://www.insurance.ca.gov/) on November 14, 2016 (Exhibit M); (14) "Workers' Compensation Insurance – Rate Filing Form" for Zurich, File # 98-9562, as retrieved from the California Department of Insurance website (https://www.insurance.ca.gov/) on November 14, 2016 (Exhibit N); (15) "Workers' Compensation Insurance – Rate Filing Form" for Zurich, File # 10-7114, as retrieved from the California Department of Insurance website (https://www.insurance.ca.gov/) on November 14, 2016 (Exhibit O); (16) "Workers' Compensation Insurance – Rate Filing Form" for Zurich, File # 16-3867, as retrieved from the California Department of Insurance website (https://www.insurance.ca.gov/) on November 14, 2016 (Exhibit P).

newspaper and magazine articles and web pages that "indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010).

Here, the parties request that the Court takes judicial notice of court documents, administrative documents, and a newspaper article. Accordingly, the Court **grants** both requests for judicial notice.

B. Factual Background

G&M Oil purchased seven annual workers' compensation insurance policies from Zurich, which ZCS administered. These policies began on December 1, 2004, December 1, 2005, December 1, 2006, December 1, 2007, December 1, 2008, December 1, 2009, and December 1, 2010. (Compl., Docket No. 1-1 ¶ 8.) In addition to these policies, the parties entered into side agreements. (Id.) The side agreements for the years 2004, 2005, 2006, and 2007 were called "incurred deductible agreements." (Id. ¶ 9.) The side agreements for the policies for the years 2008, 2009, and 2010 were called "retrospective rating agreements." (Id.) G&M Oil and the Defendants also entered into specifications to each incurred deductible agreement and retrospective rating agreement in each policy year. (Id. ¶ 14.)

G&M Oil sued the Defendants over the policies and agreements. (Id.) In its complaint, G&M Oil pleaded five causes of action: (1) breach of contract against Zurich, (2) tortious breach of the covenant of good faith and fair dealing, (3) breach of contract against ZSC, (4) violation of California Business and Professions Code § 17200, et sec., (the "UCL"), and (5) declaratory relief. (Id.)

II. LEGAL STANDARD

Summary judgment is appropriate where the record, read in a light most favorable to the nonmovant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact

regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . .") (internal quotation marks omitted).

Material facts are those necessary to the proof or defense of a claim and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.[5]

The moving party has the initial burden of establishing the absence of a material fact for trial. Id. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . ., the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)][6] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Therefore, if a nonmovant does not make a sufficient showing to establish the elements of its claims, a court must grant the motion.

III. DISCUSSION

For the following reasons, the Court (1) **grants** G&M Oil's motion for partial summary judgment and (2) **grants** Defendants' motion for partial summary judgment.

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[5] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-3.

[6] Rule 56 was amended in 2010. Subdivision (a), as amended, "carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine 'issue' becomes genuine 'dispute.'" Fed. R. Civ. P. 56, Notes of Advisory Committee on 2010 amendments.

A. G&M Oil's Motion for Partial Summary Judgment

G&M Oil seeks partial summary judgment on its fifth cause of action for declaratory relief that the deductible agreements, retrospective rating agreements, and specifications are illegal, void, and unenforceable in their entirety.[7] (Mot., Docket No. 86-1.)

The Court finds that the deductible agreements, retrospective rating agreements, and specifications are illegal, void, and unenforceable in their entirety, so it grants partial summary judgment on G&M Oil's fifth cause of action for declaratory relief.[8]

1. The Incurred Deductible Agreements, Restospective Rating Agreements, and Specifications Are Endorsements.

Section 11658 of the California Insurance Code ("section 11659") states that "[a] workers' compensation insurance policy or endorsement shall not be issued by an insurer to any person in this state unless the insurer files a copy of the form or endorsement with the rating organization . . . and 30 days have expired from the date the form or endorsement is received by the commissioner from the rating organization without notice from the commissioner, unless the commissioner gives written approval of the form or endorsement prior to that time." Cal. Ins. Code § 11658(a). In addition, title ten, section 2268 of the California Code of Regulations ("section 2268") states that "[n]o collateral

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[7] G&M Oil also states "[i]n the event the Court finds the agreements to be enforceable, G&M seeks partial summary judgment on Zurich's Thirds Cause of Action for Breach of Contract that G&M did not breach the contract as alleged." (Mot., Docket No. 86-1 at 1–2.) Because the Court finds that the agreements are invalid, the Court will not address whether G&M Oil breached the contract.

[8] Defendants state that they have sued G&M Oil under both (a) the deductible agreements and retrospective rating agreements and (b) the policies to recover the unpaid deductibles and retrospective premium. Defendants state that "separate and apart from the deductibles and retrospective premium, G&M has posted security under the Agreements, including the letter of credit and loss funds. Even if the Agreements were invalidated, there would be issues of fact as to whether Zurich should still be permitted to retain this security." The Court makes clear that its finding in this order does not determine whether Defendants are permitted to retain the security.

agreements modifying the obligation of either the insured or the insurer shall be made unless attached to and made a part of the policy." Cal. Code Regs. tit. 10, § 2268.

An endorsement to an insurance policy "is an amendment to or modification of an existing policy of insurance" that "may alter or vary any term or condition of the policy" and that "may be attached to a policy at its inception or added during the term of the policy." Adams v. Explorer Ins. Co., 107 Cal. App. 4th 438, 449 (2003). An endorsement is not limited to provisions addressing the insurer's indemnity obligations, but may be any agreement that alters or adds to any term or condition of an insurance policy. See id.

As the court in American Zurich Insurance Co. v Country Villa Service Corp., No. 2:14–cv–03779–RSWL–AS, 2015 WL 4163008, at *10 (C.D. Cal. July 9, 2015), previously noted, there is no controlling California or Ninth Circuit authority determinative of whether an agreement is invalid because of a failure to comply with section 11658; however, several relevant cases help to create factual distinctions.

For example, courts have found that section 11658 does not prevent the enforcement of an arbitration clause in a supplemental agreement. See, e.g., HealthSmart Pacific, Inc. v. Zurich Am. Ins. Co., No. 08–cv–01207–JVS–RC, at *1–*2 (C.D. Cal. Feb. 20, 2009) (concluding that section 11658 does not invalidate an arbitration clause in a supplemental agreement)[9]; Grove Lumber & Bldg. Supply, Inc. v. Argonaut Ins. Co., No. SA CV 07–1396 AHS(RNBx), 2008 WL 2705169, at *6–*7 (C.D. Cal. July 7, 2008) (finding that a section 11658 argument could not prevent the court from compelling arbitration); DMS Servs.

[9] Defendants argue that this Court found in HealthSmart that the filing requirements apply only to insurance policies and their endorsements and that deductible agreements are not insurance policies because the do not contain any insuring agreement. (Opp'n, Docket No. 114 at 3.) However, Defendants' argument over generalizes and over states this Court's reasoning. This Court only examined whether the arbitration agreements were valid. HealthSmart, No. 08–cv–01207–JVS–RC, at *1–*2. Furthermore, this Court did not follow the state court's reasoning in Ceradyne, Inc. v. Argonaut Ins. Co., No. G039873, 2009 WL 1526071 (Cal. Ct. App. June 2, 2009), because it was currently on appeal when this Court issued its order on February 20, 2009. The California appellate court issued its decision in Ceradyne on June 2, 2009. Id.

Inc. v. Zurich Am. Ins. Co., No EC 055245, at 7 (Cal. Super. Ct. Aug. 5, 2011) (finding that an arbitration agreement did not modify the insurance obligations, so it did not need to be attached to the insurance policy).

In contrast, a supplemental agreement may be invalid under section 11658 if that agreement contains "significant details regarding the terms of insurance." Ceradyne, 2009 WL 1526071, at *8 (determining that collateral agreements were unenforceable under section 11658 because those agreements looked like an insurance contract, related to the insurer's ability and obligation to provide insurance, repeated terms in the policy, defined itself as part of the insurance program, and instructed how payments were to be made and maintained)[10]; see also Country Villa, 2015 WL 4163008, at *15 (finding supplemental agreements to fall under section 11658 because the agreements could change/waive the terms of the policy, related to deductible and cost obligations, created an aggregate deductible, and defined terms tied to the policies).[11]

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[10] California Court Rule 8.1115(a) states that "an opinion of a California Court of Appeal . . . that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action. District courts in this District generally decline to consider an unpublished California decision when there is other published persuasive or binding authority on which to rely. See, e.g., Negrete v. Allianz Life Ins. Co. of N. Am., 927 F. Supp. 2d 870, 892 (C.D. Cal. 2013) (rejecting unpublished California court opinions because the unpublished opinions that were contrary to published California court opinions). However, when there is no other binding authority, a federal court may consider unpublished California opinions as persuasive authority. Emp'rs Ins. of Wausau v. Granite St. Ins. Co., 330 F.3d 1214, 1220 n.8 (9th Cir. 2003) (stating a court "may consider unpublished state decisions, even though such opinions have no precedential value" and that unpublished opinions, "while certainly not dispositive of how the California Supreme Court would rule," may still "lend[ ] support" to a certain position regarding California law); Washington v. Cal. City Correction Ctr., 871 F. Supp. 2d 1010, 1028 n.3 (E.D. Cal. 2012) ("The Court may cite unpublished California appellate decisions as persuasive authority.").

[11] Defendants state that this Court should not follow Country Villa because it relies on Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, N.Y.S.2d 275, 291 (2014), rev'd, 26 N.Y.3d 659 (2016), which New York's highest court recently reversed. (Opp'n, Docket No. 114 at 13.) However, the court in Country Villa extensively analyzed several cases besides Monarch. See Country Villa, 2015 WL 4163008, at *11–*14.

Defendants also argue that this Court should not follow Country Villa because it is at odds with Grove Lumber and HealthSmart. (Opp'n, Docket No. 114 at 13.) However, the Court

Furthermore, in California, "the construction of a statute by officials charged with its administration, including their interpretation of the authority invested in them to implement and carry out its provisions, is entitled to great weight." Ass'n for Retarded Citizens v. Dep't of Dev. Serv., 38 Cal. 3d 384, 391 (1985).

The California Insurance Commissioner stated that a side agreement regarding "integral aspects of the insurance relationship stemming from the treatment of deductibles" needs to at least be filed under section 11658.[12] Appl. of Insurance Commissioner to File Amicus Curiae Brief at *3–*4, DMS Serv., Inc. v. Sup. Ct., 205 Cal. App. 4th 1346 (2012) (No.B235819), 2011 WL 6345401. In addition, the Commissioner has concluded that supplemental agreements regarding the following topics need to be filed under section 11658: (1) reimbursements, (2) loss adjustment expenses, (3) policy related expenses, (4) indemnity/loss obligation, (5) payment or reimbursement obligations, (6) allocated loss adjustment expenses, (7) other expenses or fees, (8) the timing of reimbursements or payments, (9) collateral, (10) circumstances that constitute a default, (11) choice of law, (13) arbitration, and (14) matters that are material to obligations under a workers' compensation insurance policy. In the Matter of Zurich Am. Ins. Co., File No. DISP–2011–00811, Notice of Hearing and Order to Show Cause 4:23–5:23 (Feb. 27, 2012), ECF No. 75–3.

Here, the incurred deductible agreements are endorsements that fall under section 11658 and section 2268. Each of the incurred deductible agreements contains the following language: "[t]he purpose of this Agreement is to outline (a) the scope, description and structure of the Incurred Deductible Program ('Program') You and We have entered into and (b) the duties and obligations of each party with respect to this Program." (Ex. H, Docket No. 86-11 at 1; Ex. I,

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disagrees. The case law demonstrate that supplemental agreements regarding arbitration do not fall under section 11658, but supplemental agreements regarding the terms of the insurance do fall under section 11658.

[12] Defendants contend that the Department's positions are not entitled to deference because Defendants and the Department entered into a settlement agreement; however, a settlement agreement does not indicate that the Department has changed its views on how section 11658 should be carried out.

Docket No. 86-11 at 1; Ex. J, Docket No. 86-11 at 1; Ex. K, Docket No. 86-11 at 1.) Of particular significance is the fact that each incurred deductible agreement states that "[t]his Agreement governs the structure and operation of and the duties and obligations of each party to this Program and supersedes any Deductible endorsements to the Policy(ies), prior communications, negotiations, participating plans or letters of election." (Id.) Furthermore, the incurred deductible agreements contain deductible and cost obligations under the policies and define terms tied to the policies. (Id.) Thus, the incurred deductible agreements modify and change the existing policies, so they are endorsements and fall under section 11658 and section 2268.

In addition, the 2008 and 2010 retrospective rating agreements[13] are endorsements that fall under section 11658 and section 2268. Each of the retrospective rating agreements recites that "[t]he purpose of this Agreement is to outline (a) the scope, description and structure of the incurred Loss Retrospective Program ('Program') You and We have entered into and (b) the duties and obligations of each party with respect to this program." (Ex. L, Docket No. 86-11 at 1; Ex. N, Docket No. 86-11 at 1.) Furthermore, each of the agreements states that "[t]his Agreement governs the structure and operation of the duties and obligations of each party to this Program and supersedes any Retrospective endorsements to the Policy(ies), prior communications, negotiations, participating plans or letters of election." (Id.) It is also worth noting that each agreement

[13] Defendants argue that the retrospective rating agreements are different from the deductible agreements. (Opp'n, Docket No. 114 at 16.) For this argument, Defendants rely on the fact that retrospective rating programs issue to large commercial insurers are subject to Large Risk Alternative Rating Option ("LRARO") that allows the risks to be "retrospectively rated as mutually agreed upon by the insurer and insured." (Id. (citing to Req. Jud. Ntc. (Workers Compensation Insurance Rating Bureau, California Retrospective Rating Plan), Docket No. 114-4 at 3).) Defendants state that "[f]or each of the years at issue, the Retorspective Rating Agreements between Zurich and G&M were subject to LRARO, and the Department therefore permitted the mutual agreement between the parties." (Id.) However, the California Retrospective Rating Plan also states that "[t]his Plan was submitted to the Insurance Commissioner for review, however, it does not bear the official approval of the California Department of Insurance and it is not a regulation. An insurer must make an independent assessment regarding its use of this Plan based upon its particular facts and circumstances." (Req. Jud. Ntc. (Workers Compensation Insurance Rating Bureau, California Retrospective Rating Plan), Docket No. 114-4 at 6.) Therefore, the Court disagrees that LRARO allows Defendants to not follow section 11658 and section 2268.

dictates the cost obligations under the policies and defines terms tied to the policies. (Id.) Thus, these agreements modify and change the existing policies, so they are endorsements and fall under section 11658 and section 2268.

Lastly, the specifications are endorsements that fall under section 11658 and section 2268. (Ex. M, Docket No. 86-11.) For instance, the specifications determine the premium payments. (Id. at 3.) They also determine the loss limits that apply to all losses, claims, suits, and actions with respect to all coverage Defendants provided. (Id. at 1.) Thus, the specifications modify and change the existing policies, so they are endorsements and fall under section 11658 and section 2268.

2. Defendants Violated California Law by Not Filing the Endorsements

As previously discussed, section 11658 and section 2268 require an insurer to file any endorsements. Defendants did not file the incurred deductible agreements, retrospective rating agreements, or specifications before they were issued or entered into by Defendants and G&M Oil. (Ex. O, Docket No. 86-2.) Thus, Defendants violated section 11658 and section 2268.

3. The Proper Remedy is to Not Enforce the Endorsements

"Section 11658(a) states that a workers' compensation insurance policy or endorsement '*shall* not be issued by an insurer' unless it is filed with the WCIRB and in one way or another approved by the Commissioner, and subsection (b) states that issuing an unapproved policy or endorsement 'is unlawful.'" Country Villa, 2015 WL 4163008, at *16 (emphasis in original) (citing Cal. Ins. Code § 11658). Under section 11658, unfiled and unapproved endorsements are illegal, so they are void as a matter of law. Id. (citing Kremer v. Earl, 91 Cal. 112, 117 (1891); Monarch, 993 N.Y.S.2d 275, 290–92; Ceradyne, 2009 WL 1526071, at *11–*12.)

Here, Defendants assert that equity requires that these endorsements remain valid and enforceable. (Opp'n, Docket No. 114 at 17.) In addition, if the Court finds that the endorsements are not valid, Defendants assert that the Court should sever any invalid terms and leave the remaining terms in place. (Id.) However, the Court disagrees.

a. Equitable Enforcement

In California, "[n]o court will lend its aid to give effect to a contract which is illegal, whether it violates the common or statute law . . . ." Kremer, 91 Cal. at 117. "If, upon a review of all the state legislation upon the subject, . . . a contract appears to contravene the design and policy of the laws, a court of equity will not enforce it." Id.

However, courts in California have enforced illegal contracts in "compelling cases" "to avoid unjust enrichment and a disproportionately harsh penalty upon the plaintiff." Malek v. Blue Cross of Cal., 121 Cal. App. 4th 44, 70 (2004) (internal quotation marks and alterations omitted). "[T]he extent of enforceability and the kind of remedy granted depend [s] upon a variety of factors, including the policy of the transgressed law, the kind of illegality[,] and the particular facts." Id.

For example, in Country Villa, the court found that side agreements, or the "IDAs" as the court references them, should not be enforced. 2015 WL 4163008, at *16. The court reasoned that "there is no risk of Country Villa's unjust enrichment because an insurer's issuance of an illegal contract, even if it results in enrichment to the insured, does not result in unjust enrichment because the insured did nothing wrong, and the insurer should have known its own legal duties." Id. (citing Ceradyne, 2009 WL 1526071, at *11–*12). "Second, refusing to enforce the IDAs is not an unduly harsh penalty on Zurich, because Zurich knew or should have known its filing requirements under California law, and enforcing the IDAs would encourage illegal activity." Id. at 17. "Third, the policy behind 'the transgressed law' strongly counsels against enforcing the IDAs, as enforcing the IDAs 'would defeat the statutory purpose' of Sections 11658 and 11735 by 'allow[ing] an insurance company to bypass the governmental review process by simply waiting . . . after the policy has gone into effect to introduce additional or modified terms to its insurance program.'" Id. (quoting Ceradyne, 2009 WL 1526071, at *11). "Fourth, Zurich is the party at fault in this situation, as Zurich knew or should have know of its filing requirements under California law; it would not be equitable to allow the party who created the illegality to enforce the illegal contact." Id. (citing Ceradyne, 2009 WL 1526071, at *11). "Finally, the IDAs should not be enforced under California's "settled rule" that a contract in violation of a statute enacted for the protection of the public should not be enforced. Id. (citing Napa Valley Elec. Co. v. Calistoga Elec. Co., 38 Cal. App.

477, 478–79 (1918)). Because of this reasoning, the court did not enforce the endorsements.

Here, Defendants argue that invalidating the endorsements would leave Defendants without security and provide an undeserved windfall to G&M Oil. (Opp'n, Docket No. 114 at 18.) Furthermore, G&M agreed to all of the terms of the agreements for seven consecutive years. Defendants argue that the Department of Insurance has no objection to any of the actual terms of the agreements because it approved of the template for the agreements that Defendants submitted in 2013. (Id. (citing Req. Jud. Ntc. Ex. M, Docket No. 114-16).) Defendants contend that the templates are substantially similar to the agreements entered into between Defendants and G&M Oil. (Id.) Furthermore, the Department of Insurance approved of the templates again in 2016. (Id. (citing Req. Jud. Ntc. Ex. M, Docket No. 114-16.)

However, the Court finds that this is not a "compelling case" where the Court should enforce the illegal contracts. First, Defendants have not shown that G&M Oil engaged in any wrongful actions. Second, refusing to enforce the supplemental agreements is not unduly harsh because Defendants knew or should have known about the filing requirements. In addition, enforcing the supplemental agreements would encourage illegal activity. Third, the policy behind the transgressed law counsels against enforcing these supplemental agreements; Defendants cannot simply bypass government review by introducing new terms after the policy is effective. Fourth, Defendants are the parties at fault because they needed to file the agreements. Lastly, these supplemental agreements violate laws enacted to protect the public. That the Defendants ultimately submitted templates only confirms their ability to comply with the law and underscores their failure to do so for the relevant period. Thus, the Court concludes that equity does not require this Court to enforce the supplemental agreements.

b. Severability

Defendants also argue that the Court should sever certain portions of the endorsements. (Opp'n, Docket No. 114 at 18.) However, as the court noted in Country Villa, an insurer needs to file an entire supplemental agreement, not just portions. 2015 WL 4163008 (citing Cal. Ins. Code § 11658; Cal. Code Regs. tit. 10, § 2268). Therefore, because Defendants did not file any of the endorsements,

there are no portions that this Court can sever. Furthermore, the parties have not even addressed which portions the Court should arguably sever.

In conclusion, the Court grants G&M Oil's motion for partial summary judgment.

B. Defendants' Motion for Partial Summary Judgment

Defendants move for partial summary judgment regarding G&M Oil's first four claims: (1) breach of contract against Zurich, (2) tortious breach of the implied covenant of good faith and fair dealing, (3) breach of contract against ZSC, and (4) violation of the UCL. (Mot., Docket No. 89.) Defendants assert that summary judgment is appropriate because G&M Oil has not provided evidence of its damages and in what amount. (Id. at 1.)

Damages are a required element for all four of G&M Oil's claims. Conder v. Home Sav. of Am., 680 F. Supp. 2d 1168, 1174 (C.D. Cal. 2010) (breach of contract); Mulato v. Wells Fargo Bank, N.A., 76 F. Supp. 3d 929, 949 (breach of implied covenant of good faith and fair dealing); Perez v. Wells Fargo Bank, N.A., 929 F. Supp. 2d 988, 1003 (N.D. Cal. 2013) (economic injury is required for a UCL claim).

Speculative, remote, imaginary, contingent, or possible damages cannot serve as a basis for recovery. Scott v. Pacific Gas & Elec. Co., 11 Cal. 4th 454, 473 (1995). The Ninth Circuit has stated that a plaintiff "must provide evidence such that the jury is not left to 'speculation or guesswork' in determining the amount of damages to award." McGlinchy v. Shell Chem. Co., 845 F.2d 802, 808 (9th Cir. 1988). Summary judgment is appropriate where a party has no expert witnesses or designated documents providing competent evidence from which a jury could fairly estimate damages. Rickards v. Canine Eye Registration Found., Inc., 704 F.2d 1449, 1452 (9th Cir. 1983) (antitrust case), cert. denied, 464 U.S. 994 (1983).

G&M Oil has referenced three pieces of evidence regarding damages: (1) G&M Oil's second amended initial disclosures, (2) Troy Kisiel's ("Kisiel") deposition testimony and expert report, (3) Jennifer Talbert's ("Talbert") deposition testimony, and (3) G&M Oil's initial supplemental disclosures.

(Opp'n, Docket No. 112.) However, after examining each item, the Court finds that G&M Oil has not presented evidence of damages and there is no genuine dispute of material fact. Because the Court grants' Defendants' motion on this ground, it will not address the parties' additional arguments.

1. G&M Oil's Second Amended Initial Disclosures Are Inadmissible Evidence

"[O]ne of the principal goals of the discovery rules [is] preventing trial by ambush and surprise." Brandon v. Mare-Bear, Inc., 225 F.3d 661 (9th Cir. 2000); Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 910 (9th Cir. 2008) ("The Federal Rules of Civil Procedure 'contemplate . . . 'full and equal discovery . . . so as to prevent surprise, prejudice and perjury' during trial."). Rule 26(a)(1)(A)(iii) of the Federal Rules of Civil Procedure requires plaintiffs to provide an initial disclosure of "a computation of each category of damages claimed by the disclosing party – who must also make available . . . the documents or other evidentiary material . . . on which each computation is based, including materials bearing on the nature and extent of injuries suffered." Parties are required to supplement these initial disclosures "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). The purpose of mandatory disclosures is to "accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information." Fed. R. Civ. P. 26 advisory committee's note (1993). They are intended to limit costs by focusing discovery on the relevant issues, eliminating surprise, and promoting settlement. See id.; Sender v. Mann, 225 F.R.D. 645, 650 (D. Colo. 2004).

The Rule 26(a) and 26(e) requirements are enforced by Rule 37(c)(1), which precludes a party from presenting information that was not properly disclosed under Rule 26(a) and 26(e). The Rule 37(c)(1) sanction is "self-executing . . . , without need for a motion." Fed. R. Civ. P. 37 advisory committee's note (1993). The exclusion sanction is appropriate "even when a litigant's entire cause of action or defense has been precluded." Yeti By Molly Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001).

"[A] party failing to provide information required by Rule 26(a) or (e) is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Hoffman v. Constr. Protective Servs., Inc., 541 F.3d 1175, 1179 (9th Cir. 2008), as amended (Sept. 16, 2008) (internal quotation marks omitted); see Fed. R. Civ. P. 37(c)(1). The burden is on the disclosing party to show substantial justification or harmlessness. See Yeti By Molly, 259 F. 3d at 1106–07. In determining whether failure to comply with a discovery obligation was harmless, the Ninth Circuit uses a five-factor test: "1) the public's interest in expeditious resolution of litigation; 2) the court's need to manage its docket; 3) the risk of prejudice to the [opposing party]; 4) the public policy favoring disposition of cases on the merits; 5) the availability of less drastic sanctions." Wendt v. Host Intern., Inc., 125 F.3d 806, 814 (9th Cir. 1997).

Here, G&M Oil served its second amended initial disclosures after the close of discovery. Fact discovery closed on September 12, 2016. (Order, Docket No. 66.) In addition, affirmative expert disclosures were due by September 26, 2016. (Id.) On October 31, 2016, counsel for Defendants had a meet and confer call with counsel for G&M Oil. (Knuckey Decl., Docket No. 89-16 ¶ 14.) During the call, counsel for Defendants informed counsel for G&M that Defendants would be filing a motion fo summary judgment based, in part, on G&M's failure to provide its damages computations. (Id.) On October 31, 2016, after counsel's call, G&M served its second amended initial disclosures, which G&M claimed to "include [its] experts computation of damages in accordance with FRCP 26(e)." (Id.; Initial Disc., Docket No. 89-38.) Therefore, the Court needs to consider whether to exclude the new disclosures.

G&M Oil's only argument is that the Defendants did not comply with the meet and confer requirements of Rule 37(a)(1) or the procedures in Local Rule 37-1. (Opp'n, Docket No. 113 at 10.) However, Rule 37(a)(1) only applies to a motion "for an order compelling disclosure or discovery." Fed. R. Civ. P. 37(a)(1). Here, the issue, whether G&M Oil failed to disclose evidence, falls under Rule 37(c)(1), which does not have a separate meet and confer requirement.[14] Fed. R. Civ. P. 37(c)(1). In addition, under Local Rule 37-1, a party needs to submit a joint stipulation if the motion is regarding an *incomplete*

[14] Defendants complied with Local Rule 7-3. (Mot., Docket No. 89 at 3.)

response to a discovery request; it does not apply to a motion regarding *excluding an untimely disclosure*. See, e.g., Ballard v. U.S., No. EDCV 06-715-VAP(OPx), 2007 WL 4794101, at *2 (C.D. Cal. 2007). Therefore, the Defendants did not fail to meet the requirements of Rule 37(a)(1) and Local Rule 37-1.

G&M Oil has not made any arguments regarding whether the failure was substantially justified or harmless.[15] Because G&M Oil has not shown substantial justification or harmlessness, the Court will not consider its second amended initial disclosures. In particular, although not determinative, the Court finds the fact G&M Oil served Defendants with the new disclosures after the parties discussed Defendants' motion for summary judgment to be suspect.[16] The Court reminds G&M Oil that it cannot create evidence after the close of discovery to overcome a motion. Furthermore, the Court finds it difficult to believe that G&M Oil was not aware of the calculations that it provided in its second amended initial disclosure before the close of discovery. For these reasons, the Court will not consider the new disclosures in its analysis.

2. Kisiel's Deposition Testimony and Expert Report Does Not Provide Evidence of Damages

On October 7, 2016, Kisiel provided deposition testimony regarding his expert report. (Tr., Docket No. 89-33.) Kisiel made the following statements about damages calculations:

> Q Is there a list provided in here of – well, first of all, do you believe that – never mind. So this list that you have provided that's on page five through – or four through six, you're not saying that this is damage numbers sustained by G&M; correct?
>
> A I am.
>
> Q Okay. How do I know the amount that G&M was

[15] At the hearing on December 5, 2016, the Court invites G&M Oil to make arguments regarding whether its failure was substantially justified or harmless.

[16] The second amended initial disclosures repeat the same flaws in expert Kisiel's work described below.

damaged?

A Page six, overpayment range.

Q And so –

A That's for the payments that were issued. That's just for the payments that were issued. There's a second component, that being unsupported reserves.

Q Okay. And so are you saying that G&M was damaged in the range of $4,634,017.25 to $5,200,244.05?

A On one component.

Q Okay. And then there's – you're saying that the – the next portion there, you list what you believe are overstated reserves; correct?

A Based on the evidence, yes.

Q And so when you add those together, is it your opinion that G&M has been damaged in the amount of a range between $4,804,196 to $5,395,923?

A *In raw numbers.* So that's still raw numbers. *This is the starting point of the retro calcs or the deductible plans because these are just pure numbers. There's loss conversion factors and loss development factors that would impact this further.*

So this is just the starting point, and then there's also, my understanding, another component of damages over and above this.

Q Okay. And what is – what is the other component of damage?

A My understanding, it's bad faith. So putative damages.

Q And you say that these are just raw numbers.

A Yes.

Q So where do I find in your report what G&M alleges are its damages?

A *You mean the ultimate total damages?*

Q Yes

A *You don't find that in my report.* That would have to be – this is purely my review of the claim file material themselves. So this is the scope of the one area that I was asked to address.

Were these payments justified? If they were not – if they're overpayments, what are the amounts of overpayments, and what is the support for them? And both of those are raw numbers.

. . . .

So they – if all we were dealing with as the calculation only thing which is the loss development factor which is the 1.09, then G&M paid $1.09 for every dollar. So if we took these numbers and multiplied that times 1.09, that becomes a minimum floor before we do any other calculations.

But it's going to be dependent on the actual policy, loss conversion factors, loss development factors, and that would be the adjustment through the underwriting formulas of what each payment that should – that was made that shouldn't's have been made, this is how it backs out of the overall impact to G&M. And then we add the third component, if you will, that being the punitive damages.

> Q Okay. And so you have not been asked to run those additional numbers; correct?
>
> A Not as yet.
>
> Q *And running any damages calculations is not part of the engagement letter that has been signed*; correct?
>
> A *Correct*
>
> Q *And running any damages numbers is not part of your report which is Exhibit 300*; correct?
>
> A *It is not.*

(Id. 99:2–102:9 (emphasis supplied).)

Kisiel's deposition testimony demonstrates that he did not calculate the actual damages that G&M Oil might have incurred. This testimony shows that the calculations are a three part process. However, Kisiel only conducted the first level of calculations. By not conducting the second level of calculations, it is unclear whether G&M Oil actually suffered damages because various factors, as Kisiel stated, influence the actual amount of overpayment. In conclusion, Kisiel's testimony and report do not provide evidence of damages.

3. Talbert's Deposition Testimony Does Not Provide Evidence of Damages

In support of its opposition to Defendants' motion, G&M Oil submitted Talbert's declaration, which summarizes her deposition testimony:

> On October 29, 2015, my deposition was taken, in which I was asked to calculate the damages in this case, at the time our expert was still reviewing the claim files and had not come to a conclusion as to the amount of damages of the claims. I did however state the damages were in excess of $ 4 million, which is what our expert ultimately found to be damages in this case.

(Talbert Decl., Docket No. 112-3 ¶ 17.) However, Talbert's opinion does not add more than mere speculation that G&M Oil suffered damages. G&M Oil cannot overcome summary judgment simply by hiding the ball of damages behind vague and ambiguous responses. In conclusion, her testimony does not create evidence of damages.

4. G&M Oil's Initial Supplemental Disclosures Do Not Provide Evidence of Damages

G&M Oil's initial supplemental disclosures served on September 9, 2016, also provided a vague estimate regarding damages:

> G&M claims damages in excess of $1,000,000.00 in an amount to be proven at trial for Defendant's alleged failure to properly adjust claims, overpayments on losses paid by G&M, overpayment on duplicate invoices paid on G&M claims and related penalties. Discovery into the damages are ongoing.

(Docket No. 89-19 at 18.) This statement, like the statement in Talbert's declaration, simply provides a indefinite figure. In particular, it is problematic that each item of evidence that G&M Oil references states different figures. In conclusion, the disclosures do not provide competent evidence from which a jury could fairly estimate damages.[17]

IV. CONCLUSION

For the aforementioned reasons, the Court (1) **grants** G&M Oil's motion for partial summary judgment and (2) **grants** Defendants' motion for partial summary judgment.

IT IS SO ORDERED.

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[17] While the Court does not address them in detail, it would appear that the Defendants' statute of limitations arguments (Mot., Docket No. 89 at 20–22), Brandt arguments (id. at 14–15), different expert support arguments (id. at 9–11), and late report arguments (id. at 22-23) would prevail on closer inspection.